No. 82-1615

In the Supreme Court of the United States

OCTOBER TERM, 1982

SEBASTIAN DIAZ-SALAZAR, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Board of Immigration Appeals abused its discretion in denying an alien's motion to reopen a deportation proceeding in order to apply for suspension of deportation pursuant to 8 U.S.C. 1254(a)(1), when the Board reasonably concluded that the alien failed to make a prima facie showing of extreme hardship.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 700 F.2d 1156. The decision of the Board of Immigration Appeals (Pet. App. 19-23) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 17-18) was entered on March 1, 1983. The petition for a writ of certiorari was filed on March 31, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

8 U.S.C. 1254(a)(1) provides in pertinent part:

> As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an

alien who applies to the Attorney General for suspension of deportation and —

(1) is deportable under any law of the United States * * *; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence * * *.

STATEMENT

1. Petitioner is a 30 year old male native and citizen of Mexico who entered this country illegally in May 1974 (R. 93, 127-129, 136).[1] At his deportation hearing on October 28, 1980, petitioner admitted deportability and was granted the privilege of voluntary departure within 90 days (R. 128-129).

Through a variety of legal maneuvers, petitioner succeeded in delaying his deportation until he had accumulated seven years' presence in the United States.[2] On August 6,

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[1] "R." refers to the certified administrative record in the court of appeals.

[2] Petitioner falsely represented that he had a wife in the United States who, by virtue of the fact that she had been present in this country for seven years, was eligible for suspension of deportation. In fact, petitioner had a wife in Mexico, from whom he was separated and by whom he had two children. The woman who he claimed was his "wife" was a woman with whom he had been living in Chicago. See Pet. App. 22. Petitioner asked the immigration judge to stay consideration of his case until it could be considered jointly with his "wife's" application for suspension of deportation. The immigration judge denied the request (R. 129-131).

Petitioner appealed the denial of his request to the Board of Immigration Appeals, which dismissed his appeal because he had admitted

1981, petitioner moved to reopen his deportation proceeding so that he could apply for suspension of deportation pursuant to Section 244(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1254(a)(1) (R. 90).

Section 244(a)(1) of the Act provides that the Attorney General in his discretion may suspend the deportation and adjust the status of an otherwise deportable alien who (1) has been physically present in the United States for a continuous period of not less than seven years; (2) is a person of good moral character; and (3) is "a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. 1254(a)(1). Pursuant to regulation, an alien who seeks to reopen his deportation proceeding must allege whatever new facts he intends to prove at a reopened proceeding and must support those allegations by affidavits or other evidentiary materials. 8 C.F.R. 3.8. The Board of Immigration Appeals and immigration judges have considerable discretion in determining whether an alien's deportation proceeding

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deportability and because he had been granted voluntary departure, the only form of relief for which he was eligible (R. 111-114).

Petitioner thereupon filed the first of three petitions for review with the United States Court of Appeals for the Seventh Circuit. The filing of the petition for review, which occurred two days before petitioner was to be deported, enabled petitioner to stay his deportation until circumstances placed him in a more favorable posture to apply for suspension of deportation. (8 U.S.C. 1105a(a)(3) provides for an automatic statutory stay of deportation upon the filing of a petition for review in a court of appeals.) During the time his deportation was stayed, petitioner divorced his Mexican wife and married the woman with whom he had been living in Chicago (R. 57-58). See Pet. App. 22 n.2. In addition, as noted, petitioner by this time had been physically present in this country for more than seven years.

should be reopened. See *INS* v. *Wang*, 450 U.S. 139, 143-144 n.5 (1981). In order to prevail in a motion to reopen to apply for suspension of deportation, an alien must establish, *inter alia*, a prima facie case of "extreme hardship" within the meaning of Section 244(a)(1). *INS* v. *Wang*, *supra*, 450 U.S. at 144-145.

In his motion to reopen, petitioner alleged that he had accumulated seven years' continuous physical presence in this country and that this entitled him to apply for suspension of deportation (R. 44). Petitioner's motion to reopen was accompanied by an application for suspension of deportation in which he alleged that his deportation would cause him and his two citizen children extreme hardship (R. 93). Petitioner did not, however, submit any affidavits or evidentiary materials to support his allegations of extreme hardship.[3] The immigration judge denied petitioner's motion to reopen, finding that petitioner failed to make a prima facie showing of "extreme hardship" (R. 22-24).[4]

2. On appeal to the Board,[5] petitioner supplemented his allegations of extreme hardship by submitting the report of

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[3]Petitioner did submit affidavits attesting to his good moral character, financial records showing his income during the preceding seven years, and records showing his recent divorce and remarriage and the birth of his two United States citizen children (R. 47-87). He also submitted a memorandum in which his attorney argued that (1) petitioner would suffer extreme hardship if deported because he would lose a well-paying job in Chicago; and (2) petitioner's minor children would suffer extreme hardship because they would be deprived of educational benefits and the advantages of being raised in the United States (R. 39). These arguments were unsupported by any affidavits.

[4]The immigration judge also concluded that petitioner did not merit a favorable exercise of discretion with respect to his motion to reopen because petitioner had pursued an appeal to the Board while grossly misrepresenting his relationship to the woman with whom he had been living in Chicago (R. 24). See note 2, *supra*.

[5]While petitioner's appeal to the Board was pending, the INS again moved to deport him (R. 9). When the Board denied petitioner's request

a social worker, who expressed the opinion that petitioner's deportation to Mexico would cause extreme hardship to his citizen children because it would disrupt the stability of their extended family and would deprive them of the benefits available to children raised in the United States (R. 9C-10C).

The Board denied petitioner's motion to reopen,[6] holding that he had failed to demonstrate a prima facie case that deportation would result in extreme hardship either to himself or to his children (Pet. App. 19-23). The Board noted that petitioner, like most aliens, would suffer some degree of financial hardship and economic loss upon deportation, but concluded that an alien's inability to maintain the standard of living he has achieved in the United States does not render him eligible for suspension of deportation (*id.* at 21). In addition, the Board noted that petitioner's children were both under the age of three and therefore were too young to have developed meaningful ties to the United States. The Board ruled that the adjustments such young children would be required to make to life in Mexico did not constitute "extreme hardship" (*ibid.*). The Board also denied petitioner's motion to reopen as a matter of discretion because it concluded (*id.* at 22) that petitioner's

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for a stay of deportation (R. 1A), he filed a second petition for review in the court of appeals, despite the fact that a court of appeals has no jurisdiction to review the denial of an interlocutory stay of deportation. See *Cheng Fan Kwok* v. *INS*, 392 U.S. 206 (1968); *Reyes* v. *INS*, 571 F.2d 505 (9th Cir. 1978); *Ruiz-Mancilla* v. *INS*, 571 F.2d 510 (9th Cir. 1978). Petitioner thereby obtained another statutory stay of deportation and again was able to prevent his deportation. The court of appeals ultimately dismissed this petition for review for lack of jurisdiction (Pet. App. 4-5).

[6]The Board treated petitioner's appeal from the immigration judge's decision as a motion to reopen filed before the Board, because the motion should have been addressed to the Board in the first instance (Pet. App. 20).

lack of candor about his marriage and his reliance on dilatory tactics did not present a case that merited a favorable exercise of discretion. See note 2, *supra*.

3. The court of appeals held that the Board did not abuse its discretion in denying petitioner's motion to reopen (Pet. App. 1-16). The court noted (*id.* at 6) that under *INS* v. *Wang*, *supra*, "the application of the extreme hardship standard in an individual case is a task allotted primarily to the INS and not to the courts." Considering all of the factors cited by petitioner, the court concluded that petitioner failed to present a prima facie case of extreme hardship and that the Board was within its discretion in denying the motion to reopen (Pet. App. 6-7). The court reasoned that the economic hardships petitioner alleged he would suffer were not unique in comparison with other Mexicans in his situation currently in the United States, and that petitioner's pre-school age children would be less susceptible than older children "to the disruption of education and change of language involved in moving to Mexico" (*id.* at 7).

ARGUMENT

Petitioner contends that the court of appeals erred in affirming the Board of Immigration Appeals' denial of his motion to reopen his deportation proceeding. He asserts that the facts alleged in his motion to reopen presented a prima facie case for suspension of deportation and that he therefore was entitled to a hearing on his application for suspension of deportation. The decision of the court of appeals, however, correctly disposes of these essentially fact-bound claims and is fully consistent with this Court's decision in *INS* v. *Wang*, *supra*. It therefore does not warrant further review.

1. In *Wang*, this Court ruled that the Board has the statutory authority to construe the Section 244(a)(1) extreme hardship requirement narrowly, and it observed that such a

construction is consistent with the exceptional nature of the remedy of suspension of deportation. The Court also held that the Board's application of the extreme hardship requirement in individual cases must be upheld so long as the Board is acting within the broad discretion granted to it by law. 450 U.S. at 144-145.

Relying on *Wang*, the court of appeals correctly upheld the Board's conclusion that petitioner was not entitled to have his deportation proceeding reopened because he failed to make out a prima facie case for suspension of deportation. In so doing, the court determined that the Board acted within its statutory authority in construing the extreme hardship requirement. First, the Board reasonably concluded that petitioner's claim that deportation would result in loss of his job and of the economic stability that he has achieved in this country does not warrant a finding of extraordinary or exceptional hardship. On the contrary, petitioner's claim is indistinguishable from the type of economic hardship that most aliens would experience upon deportation to Mexico. The BIA and the courts have consistently determined that such allegations of financial hardship do not establish "extreme hardship" within the meaning of the statute. See *INS* v. *Wang, supra*, 450 U.S. at 142; *Ramirez-Gonzalez* v. *INS*, 695 F.2d 1208, 1211-1212 (9th Cir. 1983); *Santana-Figueroa* v. *INS*, 644 F.2d 1354, 1356 (9th Cir. 1981); *Pelaez* v. *INS*, 513 F.2d 303 (5th Cir.), cert. denied, 423 U.S. 892 (1975).

Second, the Board correctly concluded that the allegation that petitioner's deportation would disrupt his family's stability and would deprive his citizen children of the benefits of a life in this country is mitigated by the very young age of the children. See, *e.g.*, *Ramirez-Gonzalez* v. *INS*, *supra*, 695 F.2d at 1212-1213; *Barrera-Leyva* v. *INS*, 637 F.2d 640, 644-645 (1980), aff'd on rehearing, 653 F.2d 379 (9th Cir. 1981); *Choe* v. *INS*, 597 F.2d 168 (9th Cir. 1979). It is

well established that the mere allegation and proof that an alien's citizen children will suffer some deprivation upon deportation is not sufficient to make a prima facie showing of "extreme hardship." See *Aguilar* v. *INS*, 638 F.2d 717 (5th Cir. 1981); *Wosough-Kia* v. *INS*, 597 F.2d 1311 (9th Cir. 1979); *Lee* v. *INS*, 550 F.2d 554 (9th Cir. 1977); *Faddah* v. *INS*, 553 F.2d 491, 496 (5th Cir. 1977). See also *INS* v. *Wang*, *supra*, 450 U.S. at 142-143, 144-145.[7]

2. Petitioner contends (Pet. 16-21) that the court of appeals' decision conflicts with the decisions of other circuits. In most of the cases cited by petitioner, however, "the asserted conflict in decisions arises from differences in states of fact, and not in the application of a principle of law." *Wisconsin Electric Co.* v. *Dumore Co.*, 282 U.S. 813 (1931).

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[7]Petitioner suggests (Pet. 13) that the court below improperly relied on *INS* v. *Wang* because the circumstances of that case are "clearly distinguishable" from those presented here. *Wang* involved a motion to reopen to apply for suspension of deportation filed by a relatively affluent and educated Korean couple who alleged that deportation would cause extreme hardship to their two citizen children because the children did not speak Korean and would lose educational opportunities if forced to leave this country. They also claimed economic hardship to themselves and their children resulting from the forced liquidation of their assets. 450 U.S. at 142. Although the facts in *Wang* are not identical in every respect to those in petitioner's case, the factual differences between the two cases are not significant, because the holding of *Wang* is not limited by the particular facts of the case.

Petitioner also errs in suggesting (Pet. 13, 19 n.14) that *Wang* stands only for the proposition that an alien must strictly comply with the regulations governing a motion to reopen. Although the Court in *Wang* held that an alien must support his allegations with affidavits or other evidentiary materials (see 450 U.S. at 143), that was only one of two reasons the Court gave for reversing the judgment of the court of appeals. The "more fundamental" reason relied upon by the Court was that the court of appeals had encroached on the broad discretion of the Attorney General and his delegates in interpreting and applying the "extreme hardship" requirement. See 450 U.S. at 144-146.

Thus, as the court of appeals recognized in rejecting petitioner's claim (Pet. App. 7), many of the cases on which petitioner relies "require that some factor beyond the general misery attendant upon deportation present itself in order to justify relief under the extreme hardship standard."[8] Here, however, as the court below concluded (*ibid.*), "no special circumstances are presented sufficient to bring petitioner's situation within the extreme hardship standard." In a number of other cases cited by petitioner, the courts found an "abuse of discretion" and remanded suspension cases to the Board on a variety of procedural grounds.[9] In none of the cases cited by petitioner did the courts grant the type of relief that petitioner has requested in this case. On the contrary, the courts of appeals have recognized that they do not have the power to compel the Board to reopen a case and grant an evidentiary hearing to an alien on his suspension of deportation application simply because there is a dispute over the sufficiency of a showing of extreme hardship. See *Ramirez-Gonzalez* v. *INS*, *supra*, 695 F.2d at 1213.

3. Petitioner argues at length (Pet. 10-15) that his due process rights were violated when the Board denied his motion to reopen without granting him a hearing on his

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[8]See *Sida* v. *INS*, 665 F.2d 851 (9th Cir. 1981) (child's medical problems); *Prapavat* v. *INS*, 662 F.2d 561 (9th Cir. 1981) (same); *Mejia-Carrillo* v. *INS*, 656 F.2d 520 (9th Cir. 1981) (separation of teenage son from divorced father and loss of opportunity to complete high school); *Santana-Figueroa* v. *INS*, 644 F.2d 1354 (9th Cir. 1981) (advanced age of alien).

[9]See, *e.g.*, *Reyes* v. *INS*, 673 F.2d 1087 (9th Cir. 1982) (finding that BIA erred in disbelieving facts stated in affidavits supporting suspension application); *Chae Kim Ro* v. *INS*, 670 F.2d 114 (9th Cir. 1982) (finding that BIA erred in concluding that birth of aliens' United States citizen child after immigration hearing had been concluded was not "new fact"); *Ravancho* v. *INS*, 658 F.2d 169 (3d Cir. 1981) (finding that BIA erred in not considering all of the relevant factors bearing on extreme hardship).

suspension of deportation application. Petitioner's due process claim, however, is premised on the assumption that petitioner presented a prima facie case for suspension of deportation (see Pet. 9, 13).[10] Because the Board, upheld by the court of appeals, correctly concluded that petitioner failed to make such a prima facie showing, petitioner's due process argument falls of its own weight. See *Codd* v. *Velger*, 429 U.S. 624 (1977).

Furthermore, petitioner's due process arguments are seriously flawed in several other respects. Contrary to petitioner's claim (Pet. 11), he does not have a "right 'to stay and live and work in this land of freedom.' " Petitioner is an illegal alien under a final order of deportation and there are no laws that give him the right to continue to live in this country. In addition, to the extent that petitioner's due process argument discusses the deprivations that his children may suffer upon his deportation (Pet. 11-12), petitioner ignores the fact that there is no governmental action in this case directed toward his children. The order of deportation pertains only to petitioner; his children are under no governmental compulsion to leave and are free to remain in the United States. The courts have long recognized the unfortunate fact that the deportation of alien parents may cause their minor citizen children to suffer hardships and deprivation. However, an illegal alien like petitioner is not entitled to special consideration or to favored status merely because he has a child who is a United States citizen. See *Hernandez-Rivera* v. *INS*, 630 F.2d 1352, 1356 (9th Cir. 1980); *Urbano de Malaluan* v. *INS*, 577 F.2d 589, 594 (9th Cir. 1978). "Petitioners, who illegally [remain] in the United States for the occasion of the birth of their citizen children,

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[10]Petitioner does not, and could not, contend that every alien is automatically entitled to a hearing on a suspension of deportation claim. Such a contention would be untenable in light of *INS* v. *Wang*, *supra*.

cannot thus gain favored status over aliens those who comply with the immigration laws of this nation. Any ruling which had this effect would stand those statutes on their heads." *Gonzalez-Cuevas* v. *INS*, 515 F.2d 1222, 1224 (5th Cir. 1975).

4. In any event, the Board acted reasonably and within its authority in denying petitioner's motion to reopen solely as a matter of discretion. The Board has discretion in determining under what circumstances a deportation hearing should be reopened. See *INS* v. *Wang, supra*, 450 U.S. at 143-144 n.5. In denying a motion to reopen, the Board need not reach the issue of whether an alien has made a showing of eligibility for the relief requested if the Board decides, as a matter of discretion, that an alien does not deserve to have his proceeding reopened. See *Agustin* v. *INS*, 700 F.2d 564, 566 (9th Cir. 1983); *Ramirez-Gonzalez* v. *INS, supra*, 695 F.2d at 1211. See also *INS* v. *Bagamasbad*, 429 U.S. 24, 26 (1976).

The Board's discretionary denial of petitioner's motion to reopen was fully justified in this case. Petitioner lied to the immigration authorities and the Board about his marital status and pursued his first petition for review in the court of appeals solely in order to remain in this country while he put himself in a better posture to apply for suspension of deportation. It was not unreasonable for the Board to conclude that an alien who had lied and had used dilatory tactics to obtain immigration benefits did not deserve a favorable exercise of discretion in regard to his motion to reopen.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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